Supreme Court, U.S.
FILED
MAR 6 - 2015
OFFICE OF THE CLERK

Nos. 14-556, 14-562, 14-571 and 14-574

IN THE

Supreme Court of the United States

JAMES OBERGEFELL, ET AL., *Petitioners*,

v.

RICHARD HODGES, DIRECTOR, OHIO DEPARTMENT OF HEALTH, ET AL., *Respondents*.

VALERIA TANCO, ET AL., *Petitioners*,

v.

BILL HASLAM, GOVERNOR OF TENNESSEE, ET AL., *Respondents*.

APRIL DEBOER, ET AL., *Petitioners*,

v.

RICK SNYDER, GOVERNOR OF MICHIGAN, ET AL., *Respondents*.

GREGORY BOURKE, ET AL., *Petitioners*,

v.

STEVE BESHEAR, GOVERNOR OF KENTUCKY, ET AL., *Respondents*.

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF DOUGLAS LAYCOCK, THOMAS C. BERG, DAVID BLANKENHORN, MARIE A. FAILINGER, AND EDWARD MCGLYNN GAFFNEY, AS AMICI CURIAE IN SUPPORT OF PETITIONERS

Thomas C. Berg
Univ. of St. Thomas School of Law
MSL 400, 1000 LaSalle Ave.
Minneapolis, MN 55403
651-962-4918
tcberg@stthomas.edu

Douglas Laycock
Counsel of Record
Univ. of Virginia Law School
580 Massie Road
Charlottesville, VA 22903
434-243-8546
dlaycock@virginia.edu

QUESTION PRESENTED

This brief addresses the question whether protection of religious liberty is a reason to prohibit same-sex marriage, or whether instead, the Court can fully protect both marriage equality and religious liberty.

TABLE OF CONTENTS

Table of Authorities iv

Interest of Amici 1

Summary of Argument 1

Argument 6

I. This Court Should Recognize a Right to Same-Sex Marriage 6

A. The Right to Marry Is Fundamental, and the Grounds Asserted in These Cases Are Insufficient to Justify Denial of That Right. ... 6

B. Legitimate Concerns for Religious Liberty Are Not a Reason to Deny Same-Sex Couples the Right to Marry 11

C. The Proper Response to the Conflict Between Gay Rights and Religious Liberty Is to Protect the Liberty of Both Sides. 12

II. When the Court Invalidates Laws Prohibiting Same-Sex Civil Marriage, It Must Take Responsibility for the Resulting Religious Liberty Issues 16

A. Judicial Protection of the Right to Same-Sex Marriage Often Displaces Legislative Protection of Religious Liberty with Respect to Marriage. 16

B. Marriage is Both a Legal and a Religious Relationship, and Religious Organizations Must Remain Free to Define Religious Marriage 20

C. Legal Recognition of Same-Sex Marriage Will Give Rise to Many Religious-Liberty Issues. 24

III. Doctrinal Tools Are Available to Protect Religious Liberty with Respect to Marriage. 30

A. Religious Organizations Have the Right to Make Internal Decisions That Affect Their Faith and Mission 30

B. Religious Organizations Have the Right to Take "External" Actions, Subject to the Compelling Interest Test, If a Religiously Burdensome Law Has Secular Exceptions. ... 32

C. Religious Liberty Is Also Protected by State Constitutions and by State and Federal Statutes 34

D. In an Appropriate Future Case, the Court Should Reconsider Free-Exercise Exemptions from Generally Applicable Laws 35

Conclusion 37

Appendix: Identifying the Individual Amici A-1

TABLE OF AUTHORITIES

Cases

Alicea-Hernandez v. Catholic Bishop, 320 F.3d 698 (7th Cir. 2003) 31

Baskin v. Bogan, 766 F.3d 648 (7th Cir. 2014) 11

Bob Jones University v. United States, 461 U.S. 574 (1983) 27

Bowen v. Roy, 476 U.S. 693 (1986) 12

Boy Scouts of America v. Wyman, 335 F.3d 80 (2d Cir. 2003) 27

Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) 16, 36

Catholic Charities v. City of Portland, 304 F. Supp. 2d 77 (D. Me. 2004) 25

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993) 4, 33, 35

City of Boerne v. Flores, 521 U.S. 507 (1997) 35

Conlon v. InterVarsity Christian Fellowship/ USA, 2015 WL 468170 (6th Cir. Feb. 5, 2015) ... 31

EEOC v. Catholic University, 83 F.3d 455 (D.C. Cir. 1996) 31

Elane Photography, LLC v. Willock, 309 P.3d 53 (N.M. 2013) 28

Employment Division v. Smith, 494 U.S. 872 (1990) 4, 15, 32-37

Evans v. City of Berkeley, 129 P.3d 394 (Cal. 2006) 27

Fraternal Order of Police v. City of Newark,
170 F.3d 359 (3d Cir. 1999) 33

Garden State Equality v. Dow,
82 A.3d 336 (N.J. Super. Ct. 2013) 18

Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006) 36

Goodridge v. Department of Public Health,
798 N.E.2d 941 (Mass. 2003) 21, 23

Griego v. Oliver, 316 P.3d 865 (N.M. 2013) 23

Griswold v. Connecticut, 381 U.S. 479 (1965) 6

Holt v. Hobbs, 135 S. Ct 853 (2015) 36

Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC,
132 S. Ct. 694 (2012) 4, 30, 36-37

Kitchen v. Herbert,
755 F.3d 1193 (10th Cir. 2014) 11, 23

Levin v. Yeshiva University,
754 N.E.2d 1099 (N.Y. 2001) 25

Locke v. Davey, 540 U.S. 712 (2004) 36

Loving v. Virginia, 388 U.S. 1 (1967) 6

Lyng v. Northwest Indian Cemetery Protective Association, 485 U.S. 439 (1988) 12

Marriage Cases, In re,
183 P.3d 384 (Cal. 2008) 14, 23

Meyer v. Nebraska, 262 U.S. 390 (1923) 6

Natal v. Christian and Missionary Alliance,
878 F.2d 1575 (1st Cir. 1989) 31

Petruska v. Gannon University,
462 F.3d 294 (3d Cir. 2006) 31

Scharon v. St. Luke's Episcopal Presbyterian Hospitals, 929 F.2d 360 (8th Cir. 1991) 31

Shaliehsabou v. Hebrew Home,
363 F.3d 299 (4th Cir. 2004) 31

Sherbert v. Verner, 374 U.S. 398 (1963) 32

Skinner v. Oklahoma, 316 U.S. 535 (1942) 6

State v. Arlene's Flowers, Inc., No. 13-2-00871-5
http://www.adfmedia.org/files/ArlenesFlowers
SJruling.pdf (Wash. Super. Ct. Feb. 18, 2015) ... 28

Turner v. Safley, 482 U.S. 78 (1987) 7

United States v. Windsor,
133 S. Ct. 2675 (2013) 8, 10

Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009) 14

Ward v. Polite, 667 F.3d 727 (6th Cir. 2012) 25

Zablocki v. Redhail, 434 U.S. 374 (1978) 6-7

Constitutional Provisions

State constitutions collectively,
religious liberty provisions 5, 18, 34

U.S. Const., amend. I, Free Exercise Clause 12, 32

U.S. Const., amend. XIV

Due Process Clause 6

Equal Protection Clause 6

Statutes

Cal. Fam. Code § 400(a) (Deering Supp. 2014) 17

Conn. Gen. Stat. §§ 46b-22b, 46b-35a, 46b-35b (2013) 17

Conn. Pub. Act 09-13 (2009) 17

Defense of Marriage Act, 1 U.S.C. § 7 8

Mississippi Religious Freedom Restoration Act, Miss. Code Ann. § 11-61-1 (LexisNexis Supp. 2014) 19

Religious Freedom Restoration Act, 42 U.S.C. § 2000bb–2000bb-4 ..... 18, 34, 37

State Religious Freedom Restoration Acts, collectively 5, 18, 34

Executive Orders

Executive Order No. 13279, 67 Fed. Reg. 77141 (Dec. 12, 2002) 26

Executive Order No. 13672, 79 Fed. Reg. 42791 (July 21, 2014) 26

Secondary Authorities

Berg, Thomas C., *What Same-Sex-Marriage and Religious-Liberty Claims Have in Common*, 5 Nw. J.L. & Soc. Pol'y 206 (2010) 13

Carpenter, Dale, Windsor *Products: Equal Protection from Animus*, 2013 Sup. Ct. Rev. 183 8-9

Catechism of the Catholic Church (2d ed. 1997) 21

Dane, Perry, *A Holy Secular Institution*, 58 Emory L.J. 1123 (2009) 20

Eskridge, William N., Jr., *A Jurisprudence of "Coming Out": Religion, Homosexuality, and Collisions of Liberty and Equality in American Public Law*, 106 Yale L.J. 2411 (1997) 13

Evangelicals and Catholics Together, *The Two Shall Become One Flesh: Reclaiming Marriage*, First Things, Mar. 2015, at 23 23

Exodus 21

Friedman, Matt, *N.J. Senate Pulls Gay-Marriage Bill*, NJ.com, Dec. 16, 2013, http://www.nj.com/politics/index.ssf/2013/12/nj_senate_pulls_gay_marriage_bill.html 19

Genesis 21

Goodstein, Laurie, *Illinois Bishops Drop Program over Bias Rule*, N.Y. Times, Dec. 29, 2011, at A16 26

Kmiec, Douglas W., *Same-Sex Marriage and the Coming Antidiscrimination Campaigns Against Religion*, in *Same-Sex Marriage and Religious Liberty* 103 (Douglas Laycock, Anthony R. Picarello, Jr., & Robin Fretwell Wilson, eds., 2008) 27

Lattin, Don, *Charities Balk at Domestic Partner, Open Meeting Laws*, San Francisco Chronicle, July 10, 1998, at A1 25

Laycock, Douglas, *Afterword*, in *Same-Sex Marriage and Religious Liberty* 189 (Douglas Laycock, Anthony R. Picarello, Jr., & Robin Fretwell Wilson, eds., 2008) 22

Laycock, Douglas, *Religious Liberty and the Culture Wars*, 2014 U. Ill. L. Rev. 839 34

Laycock, Douglas, Picarello, Anthony R., Jr., & Wilson, Robin Fretwell, eds., *Same-Sex Marriage & Religious Liberty* (2008) 22, 24, 27

Matthew 21

National Conference of State Legislatures, *Same-Sex Marriage Laws*, http://www.ncsl.org/research/human-services/same-sex-marriage-laws.aspx 17

Rauch, Jonathan, *Gay Marriage: Why It is Good for Gays, Good for Straights, and Good for America* (2004) 7

Smith, D., *Accreditation Committee Decides to Keep Religious Exemption*, 33 Monitor on Psychology No. 1, Jan. 2002, at 16 26

Stern, Marc D., *Same-Sex Marriage and the Churches*, in *Same-Sex Marriage and Religious Liberty* 1 (Douglas Laycock, Anthony R. Picarello, Jr., & Robin Fretwell Wilson, eds., 2008) 24-26

Turley, Jonathan, *An Unholy Union: Same-Sex Marriage and the Use of Governmental Programs to Penalize Religious Groups with Unpopular Practices*, in *Same-Sex Marriage and Religious Liberty* 59 (Douglas Laycock, Anthony R. Picarello, Jr., & Robin Fretwell Wilson, eds., 2008) 27

Wilson, Robin Fretwell, *Marriage of Necessity: Same-Sex Marriage and Religious Liberty Protections*, 64 Case W. Res. L. Rev. 1161 (2014) 17

INTEREST OF *AMICI*

Amici are four legal scholars and a policy analyst who have studied religious liberty, same-sex civil marriage, and the relationship between the two. These amici believe that this Court can, and should, protect both the right to same-sex civil marriage and the right to religious liberty. Individual amici are described in the Appendix.[1]

SUMMARY OF ARGUMENT

I. A. The Court must protect the right of same-sex couples to marry, and it must protect the right of churches, synagogues, and other religious organizations not to recognize those marriages. This brief is an appeal to protect the liberty of both sides in the dispute over same-sex marriage.

The choice of whom to marry is one of the most intimate and personal decisions that any human being can make. The right to marry has long been recognized as fundamental. Heightened scrutiny is therefore appropriate.

The reasons proffered for refusing civil marriage to same-sex couples do not come close to justifying denial of a fundamental right. Marriage is about far more than children. But even if children were the only purpose of marriage, it would not matter, because

---

[1] This brief was prepared entirely by amici and their counsel. No other person made any financial contribution to the preparation or submission of this brief. The consents of respondents are on file with the Clerk; the consent of petitioners is submitted with the brief. All cited websites were last visited March 5, 2015.

same-sex couples raise many children. Concern for children cannot explain either civil marriage or the exclusion of same-sex couples.

B. Serious issues of religious liberty will arise in the wake of same-sex marriage. But it is not appropriate to prohibit same-sex civil marriage to avoid having to address those issues. No one can have a right to deprive others of their important liberty as a prophylactic means of protecting his own. And there is no burden on religious exercise when the state recognizes someone else's civil marriage. Burdens on religious exercise arise only when the state demands that religious organizations or believers recognize or facilitate a marriage in ways that violate their religious commitments.

C. The proper response to the mostly avoidable conflict between gay rights and religious liberty is to protect the liberty of both sides. Both sexual minorities and religious minorities make essentially parallel claims on the larger society. Both sexual orientation and religious faith, and the conduct that follows from each, are fundamental to human identity. Both same-sex couples, and religious organizations and believers committed to traditional understandings of marriage, face hostile regulation that condemns their most cherished commitments as evil.

The American solution to this conflict is to protect the liberty of both sides. Same-sex couples must be permitted to marry, and religious dissenters must be permitted to refuse to recognize those marriages.

II. A. If this Court holds that same-sex marriage is constitutionally required, it must take responsibility

for the resulting issues of religious liberty, because a constitutional decision will largely displace legislative efforts to address the issue. States that have enacted same-sex civil marriage by legislation have generally included provisions to protect religious liberty. But where marriage equality has arrived by judicial decision, religious liberty has not been protected. When courts find a constitutional right to same-sex civil marriage, those who would add religious liberty provisions to a marriage bill are deprived of a legislative vehicle and deprived of bargaining leverage. Legislative bargaining is critical to protecting religious liberty in the growing number of states where religious objections to same-sex marriage have become unpopular. A constitutional decision by this Court will end legislative efforts to protect religious liberty as part of legislation enacting marriage equality. If the Court protects same-sex marriage, it must also protect religious liberty with respect to marriage.

B. Marriage is both a legal relationship and a religious relationship. The two relationships can be distinguished in principle, although they are intertwined in law and especially in the culture. A state, or this Court, can change the definition of *civil* marriage. But neither can change the definition of *religious* marriage.

C. Many religious organizations and believers view marriage as an inherently religious institution, with civil marriage resting on a foundation of religious marriage. They therefore refuse to recognize same-sex civil marriages as marriages. These religious refusals give rise to numerous religious-liberty issues, from clergy's performance of weddings or provision of

marriage counseling, to employment and spousal fringe benefits, to married student housing at religious colleges, to placement of children for adoption at religious social-service agencies. Religious organizations are facing lawsuits, civil penalties, and loss of government benefits.

III. Doctrinal tools are available to protect religious liberty with respect to marriage.

A. Government may not interfere "with an internal church decision that affects the faith and mission of the church itself." *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 132 S. Ct. 694, 707 (2012). Whether to recognize a marriage, for purposes internal to the religious organization, is such a protected decision.

B. Some religious refusals to recognize same-sex civil marriages will likely be characterized as external rather than internal, as in the case of placing children for adoption. In those cases, religious liberty is still protected, subject to the compelling interest test, from laws that are not neutral, or not generally applicable. A law is not generally applicable if it has "at least some" secular exceptions. *Employment Division v. Smith*, 494 U.S. 872, 884 (1990). Regulating religious conduct but not secular conduct that causes the same or similar alleged harms necessarily implies that the government "devalues religious reasons for [the regulated conduct] by judging them to be of lesser import than nonreligious reasons." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 537-38 (1993).

Many laws are not generally applicable under this standard, and there will often be no compelling

interest in requiring religious organizations to recognize a same-sex marriage, even when the context can be characterized as external. In applying the compelling interest test, a court might consider, for example, whether a same-sex couple seeking goods or services from a religious organization can readily obtain comparable goods or services from other providers. If so, there might be no compelling interest in forcing the religious organization to violate its faith commitments.

C. Religious liberty is also protected by state constitutions and state Religious Freedom Restoration Acts. This Court should make clear that it is requiring only that governments recognize same-sex civil marriage, and that it is not suggesting any constitutional obstacle to state protection of religious liberty with respect to marriage.

D. In an appropriate future case, involving a law that is truly generally applicable, the Court should reconsider the rule that neutral and generally applicable laws may be applied in ways that burden or suppress the exercise of religion. That rule was never briefed or argued, and it has not been further developed in subsequent free exercise decisions, all of which were decided on other grounds.

ARGUMENT

I. This Court Should Recognize a Right to Same-Sex Marriage.

A. The Right to Marry Is Fundamental, and the Grounds Asserted in These Cases Are Insufficient to Justify Denial of That Right.

1. The choice of whom to marry is one of the most intimate and personal decisions that any human being can make. Government should not interfere with that choice without a very important reason. Nor should government leave a substantial class of people with no one, on any realistic view of the matter, whom they can legally marry. A state's refusal to permit same-sex civil marriages prima facie violates both the Due Process Clause and the Equal Protection Clause. At the very least, some form of heightened scrutiny is required.

This Court has long recognized "the right to marry" as a right "of fundamental importance." *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978). It is a "fundamental freedom" and "one of the 'basic civil rights of man.'" *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (quoting *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)). It is protected from discrimination, as in *Loving*, and it has long been understood to be part of the liberty protected by the Due Process Clause. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). It is a relationship that is "intimate to the degree of being sacred." *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965).

The Court has unanimously protected the right to marry even for prisoners. *Turner v. Safley*, 482 U.S. 78, 94-100 (1987). The laws at issue in these cases deprive law-abiding gays and lesbians of a right so fundamental that it is protected even for incarcerated felons.

2. The court of appeals applied rational-basis review. In part it reasoned that petitioners seek not to correct "an unconstitutional eligibility requirement for marriage," but to "create a new definition of marriage." Pet. App. 49a. The definition of marriage as inherently male-female is central to many religious understandings of marriage. But calling the issue "definitional" does not justify laws that effectively exclude gays and lesbians altogether from civil marriage. "[T]he right to marry is of fundamental importance for *all* individuals," *Zablocki*, 434 U.S. at 384 (emphasis added), not just for some. And unlike other limitations on civil marriage, the exclusion of same-sex couples precludes gays and lesbians from marrying *anyone* with whom they can form the bond of physical and emotional intimacy that characterizes marriage. *See* Jonathan Rauch, *Gay Marriage: Why It is Good for Gays, Good for Straights, and Good for America* 125-27 (2004).

The court of appeals thus erred in warning that adopting heightened scrutiny would "subject[t] all state eligibility rules for marriage to rigorous, usually unforgiving, review." Pet. App. 50a. The Court in *Zablocki* did not "suggest that every state regulation which relates in any way to the incidents of or prerequisites for marriage must be subjected to rigorous scrutiny." 434 U.S. at 386. The rules at issue in *Zablocki* prevented the respondents there from

marrying *anybody*, just as the ban on same-sex marriage effectively leaves gays and lesbians with *no* eligible partners.

3. It is better to invalidate these laws under heightened scrutiny than under rational-basis scrutiny. Heightened scrutiny would avoid declaring that the longstanding, widely held view of marriage as inherently a male-female relationship is utterly irrational or an expression of "animus" or malice towards gays and lesbians. Holding that the disparate burden imposed on same-sex families fails heightened scrutiny will vindicate their rights while avoiding unnecessary denigration of conflicting views.

But if the Court chooses to hold that traditional-marriage laws lack a rational basis, it should make clear that it is not thereby finding that the laws rest on animus in the sense of hatred or malice. The point, rather, is the lack of plausible secular reasons for the harm inflicted on same-sex couples and their children. The Court referred to "animus" against gays and lesbians in *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013). But as one leading defender of *Windsor* and of same-sex marriage has emphasized:

> To say that DOMA reflected animus is ... not to say that those who hew closely to the traditional religious understanding of marriage in their own lives and within their own faith traditions are themselves hateful. ... The focus is on the inadmissibility of the reasons offered for supporting the legislation in a republic committed to the concept of equal protection for every citizen.

Dale Carpenter, Windsor *Products: Equal Protection*

from Animus, 2013 Sup. Ct. Rev. 183, 241.

In particular, the permissible reasons the state may give for restricting marriage in civil law are more limited than the reasons religious organizations and individuals may give for defining marriage in their own traditions. Those religious reasons are not irrational or malicious, but they are not a sufficient basis for *government* action that burdens the rights of others. And when those religious reasons are eliminated from consideration, no remotely sufficient reasons remain.

4. The secular interests offered for the exclusion of same-sex marriage do not justify the profound intrusion into the right to marry. They do not come close. The court of appeals found a rational basis in the assertion that marriage regulates the "unique procreative possibilities" of male-female couples. Pet. App. 34a (people "may well need the government's encouragement to create and maintain stable relationships within which children may flourish.").

This argument fails for several reasons. First, marriage is about much more than procreation. Few if any married couples experience their marriage as exclusively, or even predominantly, about procreation. Children are one important part of most marriages, and no part at all of many others. The government's interest in protecting children is undoubtedly important. But the claim that this interest is the reason for opposite-sex-only marriage does not fit the existing marriage laws, or the social understanding of marriage, or the lived experience of millions of married couples, all of which treat marriage as first and foremost a relationship between two adult spouses.

Second, the attempt to justify the prohibition on same-sex marriage as a means of protecting children fails on its own terms. If the only or principal purpose of state recognition of marriage were to enable children to live with two biological parents, then that policy has manifestly failed. A theoretical government interest, not remotely implemented in practice, cannot be a basis for denying the fundamental right to marry.

Third, banning same-sex marriage directly undermines the asserted government interest, because it harms the children of same-sex couples. Same-sex couples raise children resulting from assisted reproduction and from failed attempts at opposite-sex marriage — attempts often induced by societal pressure and discrimination. They raise children from adoption, and they raise children as foster parents. Denying these couples the stability, commitment, and financial benefits of legally recognized civil marriage does nothing to protect any of these children.

In *Windsor*, this Court emphasized that the federal government's refusal to recognize same-sex marriages caused "financial harm to children of same-sex couples," "humiliate[d]" those children, and made it "more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives." 133 S. Ct. at 2695, 2694. State denials of marriage inflict similar harms.

Fourth, prohibiting same-sex marriage undermines the states' alleged concern for the unintended children of opposite-sex couples, because it discourages adoption. Same-sex couples are more likely than

opposite-sex couples to adopt children, and "same-sex marriage improves the prospects of unintended children by increasing the number and resources of prospective adopters." *Baskin v. Bogan*, 766 F.3d 648, 663 (7th Cir.), *cert. denied*, 135 S. Ct. 316 (2014) (Posner, J.). Prohibiting same-sex marriage to protect children is counterproductive.

B. Legitimate Concerns for Religious Liberty Are Not a Reason to Deny Same-Sex Couples the Right to Marry.

Bans on same-sex civil marriage have also been defended on the ground that they protect the religious liberty of those who conscientiously object to same-sex marriage. *See, e.g.*, *Kitchen v. Herbert*, 755 F.3d 1193, 1227-28 (10th Cir.), *cert. denied*, 135 S. Ct. 265 (2014) (rejecting the argument).

1. Significant religious liberty issues will indeed follow in the wake of same-sex civil marriage. But it is not an appropriate response to prohibit same-sex civil marriage in order to eliminate every risk of possible impositions on religious liberty. No one can have a right to deprive others of *their* important liberty as a prophylactic means of protecting his own. Just as one's right to extend an arm ends where another's nose begins, so each claim to liberty in our system must be defined in a way that is consistent with the equal and sometimes conflicting liberty of others. Religious liberty, properly interpreted and enforced, can protect the right of religious organizations and religious believers to live their own lives in accordance with their faith. But it cannot give them any right or power to deprive others of the corresponding right to live the most intimate portions of *their* lives according to their own deepest values.

2. The mere recognition of same-sex civil marriage by the state presents no issue of religious liberty. "For the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government." *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439, 451 (1988) (internal quotation omitted). A conscientious objector can raise a free-exercise claim only when the government has restricted or penalized the objector's own religiously motivated behavior. *See id.* at 450-52; *Bowen v. Roy*, 476 U.S. 693, 699-701 (1986).

Religious-liberty issues begin not when a same-sex couple marries, but when the state pressures religious organizations or believers to recognize or facilitate that marriage in ways that would require them to violate their religious commitments. For reasons we detail below, the Court should acknowledge these issues and commit itself to addressing them. But their existence cannot justify denying millions of other Americans the fundamental right to marry.

We teach our children that America is committed to "liberty and justice *for all*." We must protect religious liberty *and* the right to marry.

C. The Proper Response to the Conflict Between Gay Rights and Religious Liberty Is to Protect the Liberty of Both Sides.

1. Same-sex civil marriage is a great advance for human liberty. But failure to attend to the religious-liberty implications will create a whole new set of problems for the liberties of those religious organizations and believers who cannot conscientiously

recognize or facilitate such marriages. The gain for human liberty will be greatly undermined if same-sex couples now force religious dissenters to violate conscience in the same way that those dissenters, when they had the power to do so, forced same-sex couples to hide in the closet. And that is what will happen, unless this Court clearly directs the lower courts to protect religious liberty as well as same-sex civil marriage.

There is a sad irony to the bitter conflict between supporters of same-sex civil marriage and religious organizations and believers committed to the view that marriage is inherently male-female. Sexual minorities and religious minorities make essentially parallel claims on the larger society, and the strongest features of the case for same-sex civil marriage make an equally strong case for protecting the religious liberty of dissenters. These parallels have been elaborated by scholars who work principally on religious liberty[2] and by scholars who work principally on sexual orientation.[3]

2. Both same-sex couples and committed religious believers argue that some aspects of human identity are so fundamental that they should be left to each individual, free of all nonessential regulation, even when manifested in conduct. For religious believers, the conduct at issue is to live and act consistently with

---

[2] *See* Thomas C. Berg, *What Same-Sex-Marriage and Religious-Liberty Claims Have in Common*, 5 Nw. J.L. & Soc. Pol'y 206, 212-26 (2010).

[3] *See* William N. Eskridge, Jr., *A Jurisprudence of "Coming Out": Religion, Homosexuality, and Collisions of Liberty and Equality in American Public Law*, 106 Yale L.J. 2411, 2416-30 (1997).

the demands of the Being that they believe made us all and holds the whole world together. For same-sex couples, the conduct at issue is to join personal commitment and sexual expression in a multi-faceted intimate relationship with the person they love. And often, they are following their own religious values in making the commitment to marry.

No religious believer can change his understanding of divine command by any act of will, and no person who wants to enter a same-sex marriage can change his sexual orientation by any act of will. Religious beliefs can change over time; far less commonly, sexual orientation can change over time. But these things do not change because government says they must, or because the individual decides they should; for most people, one's sexual orientation and one's understanding of what God commands are experienced as involuntary, beyond individual control. The same-sex partners cannot change their sexual orientation, and the religious believer cannot change God's mind as his religious tradition understands it.

3. In finding rights to same-sex civil marriage, courts have rejected the argument that marriage is merely conduct, distinguishable from sexual orientation and presumptively subject to state regulation. They have rejected a distinction between sexual orientation and sexual conduct because, they have correctly found, both the orientation and the conduct that follows from that orientation are central to a person's identity. *See, e.g., In re Marriage Cases*, 183 P.3d 384, 442-43 (Cal. 2008); *Varnum v. Brien*, 763 N.W.2d 862, 885, 893 (Iowa 2009).

Religious believers face similar attempts to

dismiss their claims as involving mere conduct, distinguishable from religious faith and subject to any and all state regulation. This is the premise of refusing judicial review to religiously burdensome laws that are truly generally applicable. *Employment Division v. Smith*, 494 U.S. 872 (1990). But believers cannot fail to act on God's will, and it is no more reasonable for the state to demand that they do so than for the state to demand celibacy of all gays and lesbians. Both religious believers and same-sex couples feel compelled to act on those things constitutive of their identity, and they face parallel legal objections to their actions.

4. Both same-sex couples and religious dissenters also seek to live out their identities in ways that are public in the sense of being socially apparent and socially acknowledged. Same-sex couples claim a right beyond private behavior in the bedroom: they claim the right to participate in the social institution of civil marriage. Religious believers likewise claim a right to follow their faith not just in worship services, but in the charitable activities of their religious organizations and in their daily lives.

5. Finally, both same-sex couples and religious dissenters face the problem that what they experience as among the highest virtues is condemned by others as a grave evil. Where same-sex couples see loving commitments of mutual care and support, many religious believers see disordered conduct that violates natural law and scriptural command. And where those religious believers see obedience to a loving God who undoubtedly knows best when he lays down rules for human conduct, many supporters of gay rights see intolerance, bigotry, and hate. Because

gays and lesbians and religious conservatives are each viewed as evil by a substantial portion of the population, each is subject to substantial risks of intolerant and unjustifiably burdensome regulation.

6. The classically American solution to this problem is to protect the liberty of both sides. There is no reason to let either side oppress the other. As Justice Kennedy recently wrote, "no person may be restricted or demeaned by government in exercising his or her religion. Yet neither may that same exercise unduly restrict other persons ... in protecting their own interests." *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2786-87 (2014) (Kennedy, J., concurring). Here as elsewhere, "the means to reconcile those two priorities are at hand" through religious liberty protections. *Id.* at 2787. Same-sex couples should not be denied the right to civil marriage; that is the immediate issue in this case. And when that right is secured, dissenting religious organizations should not be forced to recognize or facilitate those marriages.

II. When the Court Invalidates Laws Prohibiting Same-Sex Civil Marriage, It Must Take Responsibility for the Resulting Religious Liberty Issues.

A. Judicial Protection of the Right to Same-Sex Marriage Often Displaces Legislative Protection of Religious Liberty with Respect to Marriage.

1. All the jurisdictions that enacted same-sex civil marriage by popular decision (legislation, initiative, or referendum) also enacted religious-liberty protections for religious organizations that do not

recognize same-sex marriages. Often these religious-liberty protections were essential to passage of marriage equality; protecting religious liberty brought needed swing votes to support the bill.[4]

Almost none of the states where same-sex civil marriage has been recognized judicially, by interpretation of the state or federal constitution, have enacted religious liberty protections.[5] California enacted an extremely narrow statutory provision that protects only the right of clergy to not officiate at the wedding.[6] Among the judicial-recognition states, only Connecticut gives robust protection similar to that enacted in most of the legislative-recognition states,[7] and this was possible only because Connecticut enacted legislation codifying the judicial decision.[8]

2. The reason for this divergence is clear. When a legislature considers same-sex civil marriage, there are supporters and opponents and undecided legislators. There may be undecideds or even opponents who will become supporters if adequate provision is made for religious liberty. In the

---

[4] *See* Robin Fretwell Wilson, *Marriage of Necessity: Same-Sex Marriage and Religious Liberty Protections*, 64 Case W. Res. L. Rev. 1161, 1176-94 (2014).

[5] *See id.* at 1254-57 (collecting religious-liberty provisions from legislative and judicial states); National Conference of State Legislatures, *Same-Sex Marriage Laws*, http://www.ncsl.org/research/human-services/same-sex-marriage-laws.aspx (updating list of legislative and judicial states).

[6] Cal. Fam. Code § 400(a) (Deering Supp. 2014).

[7] Conn. Gen. Stat. §§ 46b-22b, 46b-35a, 46b-35b (2013).

[8] Conn. Pub. Act 09-13 (2009). Wilson, *supra* note 4, treats Connecticut as a legislative state, because this codification required the normal legislative process.

democratic bargaining of the legislative process, bills emerge that protect same-sex civil marriage *and* religious liberty.

The religious-liberty provisions are sometimes inserted at the last minute. They are often incomplete and ambiguous. But they provide meaningful protection for the liberty of religious organizations.

This bargaining process can break down when there is lopsided support for same-sex civil marriage. And it entirely breaks down when same-sex civil marriage becomes the law through a judicial decision on constitutional grounds. Those who would add religious-liberty protections to a civil-marriage bill are deprived of a vehicle and deprived of bargaining power. As a result, the legislature seldom attends to the specific issues of religious liberty raised by same-sex civil marriage. Those issues are left to litigation under the general religious-liberty provisions of state and federal constitutions and Religious Freedom Restoration Acts.

New Jersey clearly illustrated this dynamic. After a state court ordered recognition of same-sex marriage[9] and the state abandoned its appeal, supporters of civil marriage equality introduced legislation to codify the decision. But the bill was withdrawn after gay-rights organizations objected to the bill's (extremely narrow) religious-liberty protections. They said the bill would add "religious restrictions that are not addressed by the court decision, originally concessions made to win votes for

---

[9] *Garden State Equality v. Dow*, 82 A.3d 336 (N.J. Super. Ct. 2013).

an earlier version of the legislation."[10] Having secured marriage rights judicially, proponents were unwilling to accept any protection for religious liberty, however slight.

3. As court decisions ordering marriage equality have begun to cover much of the nation, socially conservative states have considered enacting legislative exemptions for religious dissenters. Some of these proposals badly overreached; others were quite sensible. But with only one arguable exception,[11] none of these bills has yet passed. And in any event, protection for religious liberty should not turn on the popularity in each state of the religious practice in need of protection.

The religious-liberty issue is most acutely posed in states where the traditional view of marriage has become substantially unpopular. At least in those states, a marriage-equality decision from this Court will withdraw from religious dissenters any bargaining leverage they could use to protect religious liberty.

The lesson is clear. If this Court finds a constitutional right to same-sex civil marriage, it must attend to the resulting issues of religious liberty. The Court's decision will have made it far less likely that legislatures will do so, especially in states where there is limited sympathy for the religious objectors.

---

[10] Matt Friedman, *N.J. Senate Pulls Gay-Marriage Bill*, NJ.com, Dec. 16, 2013, http://www.nj.com/politics/index.ssf/2013/12/nj_senate_pulls_gay_marriage_bill.html.

[11] Mississippi Religious Freedom Restoration Act, Miss. Code Ann. § 11-61-1 (LexisNexis Supp. 2014). This law is a general religious-liberty provision and does not directly address same-sex marriage.

Of course the Court cannot render advisory opinions on specific cases, but it should indicate that it understands the range of religious-liberty implications that will have to be addressed. The issues are judicially manageable, but this Court must acknowledge their existence, so that lower courts and legislatures will take them seriously when they arise in the wake of this Court's decision.

B. Marriage Is Both a Legal and a Religious Relationship, and Religious Organizations Must Remain Free to Define Religious Marriage.

Judges focused on discriminatory definitions of civil marriage have often failed to appreciate the range of religious-liberty issues raised by same-sex marriage. The question is not simply whether clergy must perform same-sex wedding ceremonies, although that is certainly important.

1. The religious disagreement over marriage equality begins with a disagreement over the nature of marriage. Marriage is a both a legal relationship and a religious relationship. Advocates of marriage equality tend to see the legal relationship as primary, but most religious organizations and many religious believers see the religious relationship as primary. It is possible to distinguish the two relationships, but in our law and especially in our culture, they are deeply "intertwin[ed]." Perry Dane, *A Holy Secular Institution*, 58 Emory L.J. 1123, 1174 (2009) ("The church has relied on the state to give juridical form to marriage, but the state has relied on the religious valence of marriage to give the institution meaning and depth."). If this Court invalidates discriminatory definitions of legal marriage — civil marriage in the

more common usage — it must take care not to interfere with the right of religious organizations to define religious marriage.

Civil marriage — the legal relationship — defines mutual duties of support, property rights, inheritance rights, pension rights, insurance coverage, social security benefits, tax liabilities, evidentiary privileges, rights to sue for personal injury or file for bankruptcy, and much more. Massachusetts told its highest court that "hundreds of statutes" create rules or authorize benefits on the basis of marriage. *Goodridge v. Department of Public Health*, 798 N.E.2d 941, 955 (Mass. 2003). Equality with respect to these important consequences of civil marriage — most of them financial consequences — is of course part of the reason that civil-marriage equality is so important.

The religious relationship is overlapping and intertwined but very different. Marriage is a sacrament in the Catholic faith[12] and an important religious commitment in most other faiths. Male-female marriage is ordained in both the Jewish and Christian scriptures. *Genesis* 2:22-24; *Matthew* 19:4-6. Both scriptures repeatedly condemn adultery. *See, e.g., Exodus* 20:14; *Matthew* 19:18. Christians and Jews (and adherents of other faiths as well) disagree about whether such passages make marriage *exclusively* male-female, but many read such passages to mean precisely that.

Sex and sexual morality are central to religious marriage, but increasingly peripheral to legal provisions for civil marriage. Consensual sex has been deregulated, both in and out of marriage. Adultery

---

[12] *Catechism of the Catholic Church* 400 (2d ed. 1997).

and fornication are no longer crimes, and alienation of affections is no longer a tort. It is possible, and of course extremely common, to have sex without marriage. And it is entirely possible, although presumably rare, to have a fully valid legal marriage without sex. Understandings about sex in a civil marriage are left to the married couple, and appropriately so. There is very little about sex among the hundreds of things defined by law as part of civil marriage.[13]

2. Those who see marriage as inherently religious believe that the state can *recognize* and help implement marriage, but that it cannot *redefine* marriage. Of course the state, or this Court as a matter of constitutional interpretation, can indeed redefine civil marriage, which is a relationship defined by law. But neither the state nor the Court can change the religious definition of religious marriage if religious authorities persist in their own definitions. Some churches, synagogues, and other religious organizations will refuse to recognize even civil same-sex marriages, because for them, marriage is a religious relationship at its foundation, and a same-sex marriage is religiously invalid or religiously impossible.

It is this issue of religious recognition of same-sex civil marriages that gives rise to novel issues of religious liberty. Conflicts have arisen, and will continue to arise, between religious teachings and

---

[13] These distinctions between civil and religious marriage are further elaborated in Douglas Laycock, *Afterword*, in *Same-Sex Marriage and Religious Liberty* 189, 202-03 (Douglas Laycock, Anthony R. Picarello, Jr., & Robin Fretwell Wilson, eds., 2008) (hereafter Laycock, Picarello, & Wilson).

laws prohibiting discrimination on the basis of sexual orientation, with or without same-sex marriage. But the conflicts cannot be attributed solely to the existence of antidiscrimination laws, as if the recognition of same-sex marriage has no independent effect. Marriage recognition will increase the conflicts' frequency and religious intensity. Once same-sex couples are civilly married, the existing discrimination laws suddenly apply to a relationship of profound religious significance, demanding that religious organizations and believers recognize a relationship that they believe is both inherently religious and religiously invalid.

3. Many of the appellate courts that have held marriage discrimination unconstitutional have carefully explained that they are changing only civil marriage and not religious marriage.[14] But the explanation has done little to assuage religious objections. In part this is because the culture often fails to make the distinction: the historical intertwining of religious and legal norms continues to affect contemporary attitudes. And as we have explained, those who oppose same-sex marriage on religious grounds understand civil marriage to rest on the foundation of religious marriage. On this view, a civil marriage that departs too radically from the foundation of religious marriage is simply not a marriage.[15] To treat it as though it were a marriage,

---

[14] *See, e.g.*, *Kitchen*, 755 F.3d at 1227-28; *In re Marriage Cases*, 183 P.3d at 407 n.11, 434; *Goodridge*, 798 N.E.2d at 954, 965 n.29; *Griego v. Oliver*, 316 P.3d 865, 871 (N.M. 2013).

[15] *See, e.g.*, Evangelicals and Catholics Together, *The Two Shall Become One Flesh: Reclaiming Marriage*, First Things, Mar. 2015, at 23, 27 ("what is now given the name of marriage in

for many religious organizations and believers, is to violate fundamental religious commitments. And when the inevitable lawsuits come, those charging churches and synagogues with discrimination will also be conflating civil marriage and religious marriage.

It is essential to distinguish the two relationships — protecting same-sex couples' rights to civil marriage, but also protecting religious actors' right to maintain their understandings of religious marriage. And because the two relationships have been so intertwined, it is inadequate to simply tell the religious organization being sued for discrimination that it is being forced to facilitate only a civil act, and not a religious one.

C. Legal Recognition of Same-Sex Marriage Will Give Rise to Many Religious-Liberty Issues.

1. The principal book devoted to the issue, *Same-Sex Marriage and Religious Liberty*,[16] collected contributions from seven scholars — four who supported same-sex marriage and three who did not. All seven agreed that legalizing same-sex civil marriage without providing robust religious exemptions would create widespread legal conflicts — conflicts that, as one contributor said, would work a "sea change in American law" and "reverberate across the legal and religious landscape."[17]

---

law is a parody of marriage").

[16] Laycock, Picarello, & Wilson, *supra* note 13.

[17] Marc D. Stern, *Same-Sex Marriage and the Churches*, in Laycock, Picarello, & Wilson, *supra* note 13, at 1.

Both as organizations and as individuals, those committed to traditional understandings of religious marriage may refuse to recognize, assist, or facilitate same-sex marriages. Of course this means not performing the wedding ceremony or hosting the reception. But it means much more than that.

2. Must pastors, priests, and rabbis provide religious marriage counseling to same-sex couples?[18] Must religious colleges provide married student housing to same-sex couples?[19] Must churches and synagogues employ spouses in same-sex marriages, even though such employees would be persistently and publicly flouting the religious teachings they would be hired to promote? Must religious organizations provide spousal fringe benefits to the same-sex spouses of any such employees they do hire?[20] Must religious social-service agencies place children

---

[18] *Cf. Ward v. Polite*, 667 F.3d 727 (6th Cir. 2012) (reversing summary judgment against religious counseling student expelled from graduate school for refusing to counsel with respect to problems in same-sex relationship); Stern, *supra* note 17, at 22-23 (describing attempt by St. Cloud State University to require all social-work students, as condition of admission, to affirm moral validity of same-sex relationships).

[19] *See Levin v. Yeshiva University*, 754 N.E.2d 1099 (N.Y. 2001) (holding that lesbian couple stated a claim).

[20] *See Catholic Charities v. City of Portland*, 304 F. Supp. 2d 77, 93-96 (D. Me. 2004) (upholding ordinance forcing religious charity either to extend spousal benefits to registered same-sex couples, or lose access to all city housing and community-development funds); Don Lattin, *Charities Balk at Domestic Partner, Open Meeting Laws*, San Francisco Chronicle, July 10, 1998, at A1 (describing how Salvation Army lost $3.5 million in social-service contracts with City of San Francisco because it refused, on religious grounds, to provide benefits to same-sex partners of its employees).

for adoption with same-sex couples? Already, Catholic Charities in Illinois, Massachusetts, and the District of Columbia has closed its adoption units because of this issue.[21]

Religious colleges, summer camps, day care centers, retreat houses, counseling centers, meeting halls, and adoption agencies may be sued under public accommodations laws for refusing to offer their facilities or services to same-sex couples.[22] Or they may be penalized by loss of licensing,[23] accreditation,[24] government contracts,[25] access to public

---

[21] Laurie Goodstein, *Illinois Bishops Drop Program over Bias Rule*, N.Y. Times, Dec. 29, 2011, at A16.

[22] *See* Stern, *supra* note 17, at 37-43 (assessing reach of public accommodation laws).

[23] *Id.* at 19-22 (describing licensing issues in both commercial and not-for-profit sectors).

[24] *See id.* at 23-24 (describing accreditation disputes in various academic disciplines); D. Smith, *Accreditation Committee Decides to Keep Religious Exemption*, 33 Monitor on Psychology No. 1, Jan. 2002, at 16 (describing American Psychology Association proposal to revoke accreditation of religious colleges and universities with statements of faith that preclude sex outside of marriage).

[25] See Executive Order No. 13672, 79 Fed. Reg. 42791 (July 21, 2014) (prohibiting federal contractors from sexual-orientation discrimination in employment). This Order leaves untouched an exemption (of uncertain scope) allowing religious organizations with government contracts to prefer members of their own faith in employment. Executive Order No. 13279 § 4, 67 Fed. Reg. 77141 (Dec. 12, 2002).

facilities,[26] or tax exemption.[27] Tax exemption raises particular concern because of this Court's decision in *Bob Jones University v. United States*, 461 U.S. 574, 602-04 (1983), rejecting a free-exercise claim to tax exemption for a racially discriminatory religious college. The Court in *Bob Jones* took pains to emphasize that it was considering only schools, not "churches or other purely religious institutions," and that it relied on the government's compelling interest "in denying public support to racial discrimination in education." *Id.* at 604 n.29. *Bob Jones* should not be extended to religious organizations that refuse to recognize same-sex civil marriages.

3. Disputes have also arisen about individuals who provide creative and personal services that directly assist or facilitate marriages. Must a wedding planner, or a wedding photographer, plan or photograph a same-sex wedding, even though she thinks the ceremony is a sacrilege that makes a

---

[26] *See Evans v. City of Berkeley*, 129 P.3d 394 (Cal. 2006) (upholding revocation of boat berth at public marina because of Boy Scouts' refusal to pledge not to discriminate against gay members); *Boy Scouts of America v. Wyman*, 335 F.3d 80 (2d Cir. 2003) (holding that Boy Scouts may be excluded from state's combined charitable campaign, for denying membership to openly gay individuals); Jonathan Turley, *An Unholy Union: Same-Sex Marriage and the Use of Governmental Programs to Penalize Religious Groups with Unpopular Practices*, in Laycock, Picarello, & Wilson, *supra* note 13, at 59, 69-76 (discussing these cases).

[27] *See* Douglas W. Kmiec, *Same-Sex Marriage and the Coming Antidiscrimination Campaigns Against Religion*, in Laycock, Picarello, & Wilson, *supra* note 13, at 103 (describing threat to tax exemption for religious organizations with objections to same-sex marriage); Turley, *supra* note 26, at 62-69 (same).

mockery of the religious institution of marriage?[28] Must a counselor in private practice counsel same-sex couples about their relationship difficulties, even though he thinks their relationship is religiously prohibited or intrinsically disordered? Few if any same-sex couples would ever *want* to work with such a counselor. But disputes have arisen in such cases, facilitated by professional societies and educational programs that treat commitment to the gay-rights view of these issues as a matter of professional ethics.[29] Such efforts do not obtain counseling for same-sex couples, but they do threaten to drive from the helping professions all those who adhere to longstanding religious understandings of marriage. At the very least, these professionals' religious-liberty claims should be taken seriously.

Those claims are typically limited in scope. The wedding vendors do not refuse to serve gays and lesbians as such; the florist in a recent case knowingly designed flower arrangements for the complaining couple for years, for many occasions, before refusing to design arrangements for their wedding.[30] She did not discriminate against gays as such; she declined to do the wedding because she understood it as a religious event.

A broad refusal to deal with gays and lesbians, or

---

[28] *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013), *cert. denied*, 134 S. Ct. 1787 (2014) (refusing religious exemption for photographer who declined on religious grounds to photograph same-sex commitment); *State v. Arlene's Flowers, Inc.*, No. 13-2-00871-5, http://www.adfmedia.org/files/ArlenesFlowersSJruling.pdf (Wash. Super. Ct. Feb. 18, 2015).

[29] *See* examples cited in note 18 *supra*.

[30] *Arlene's Flowers*, *supra* note 28, at 6-7.

a refusal by a large commercial business, would implicate compelling interests in ensuring gays' and lesbians' access to services, making accommodation of the objector improper. But the actual cases involve individuals' objections to direct participation in counseling or in working to make the wedding ceremony the best that it can be.

A reasonable analog to these claims is a gay publicist asked to do public relations for an anti-gay activist group, or a gay photographer asked to do promotional pictures for an anti-gay rally. They would refuse, and if they were forced to do the job, they would no doubt be conscience stricken and suffer significant emotional harm. In most jurisdictions, the law would protect their refusal; antidiscrimination laws generally do not prohibit discrimination against speech or ideologies. Photographers who decline to memorialize same-sex weddings make an analogous claim, but their refusal generally is held to fall within the laws against sexual-orientation discrimination. Protecting their analogous claim of conscience thus requires some form of religious exemption.

4. These religious-liberty disputes can arise across a wide range of factual circumstances. But they involve a discrete and bounded set of potential claimants: churches, synagogues, and other places of worship, not-for-profit organizations with strong religious commitments, and individuals in a few occupations offering personal services closely connected to marriage. What is newly at issue in the wake of same-sex marriage is the right to refuse religious recognition to civil marriages that are fundamentally inconsistent with religious definitions of marriage.

III. Doctrinal Tools Are Available to Protect Religious Liberty with Respect to Marriage.

It is not necessary or appropriate to deny the right to same-sex civil marriage in order to protect the religious liberty of organizations and individuals. Multiple doctrinal tools are available to offer protection. This Court should make clear that these tools remain available in a world with same-sex marriage.

A. Religious Organizations Have the Right to Make Internal Decisions That Affect Their Faith and Mission.

In *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 132 S. Ct. 694 (2012), this Court confirmed the longstanding rule that "ministers" cannot sue their religious employers for employment discrimination. But *Hosanna-Tabor* does not merely recognize the ministerial exception to employment-discrimination law, as important as that is. The decision rests on a broader principle: that government may not interfere "with an internal church decision that affects the faith and mission of the church itself." *Id.* at 707. This plainly covers the religious body's definition of marriage and its willingness or unwillingness to solemnize or celebrate a marriage, or to provide the space for doing so. But it also extends prima facie to the ongoing decision whether to recognize, for purposes internal to the religious organization, a marriage solemnized elsewhere.

This right to define religious doctrine and apply that doctrine to internal decisions extends beyond places of worship. *Hosanna-Tabor* involved a religious school, and the lower courts have applied the doctrine

to ministers employed in religious colleges,[31] campus ministries,[32] nursing homes,[33] hospitals,[34] mission agencies,[35] and diocesan bureaucracies.[36]

The ministerial exception imposes an absolute bar to regulation within its scope. This may be an exception to the more common approach of strict scrutiny, or it may reflect a categorical judgment that the state never has a compelling interest in forcing an unwanted minister on an unwilling religious organization. There may be other internal decisions for which compelling interests are more readily conceivable — say, protecting children — and for which the appropriate standard of protection is strict scrutiny. But cases in which government will have a compelling interest in regulating religious decisions inside a religious organization must be quite rare. And religious recognition of religiously invalid marriages is not such a case.

---

[31] *Petruska v. Gannon University*, 462 F.3d 294 (3d Cir. 2006); *EEOC v. Catholic University*, 83 F.3d 455 (D.C. Cir. 1996).

[32] *Conlon v. InterVarsity Christian Fellowship/USA*, 2015 WL 468170 (6th Cir. Feb. 5, 2015).

[33] *Shaliehsabou v. Hebrew Home*, 363 F.3d 299 (4th Cir. 2004).

[34] *Scharon v. St. Luke's Episcopal Presbyterian Hospitals*, 929 F.2d 360 (8th Cir. 1991).

[35] *Natal v. Christian and Missionary Alliance*, 878 F.2d 1575 (1st Cir. 1989).

[36] *Alicea-Hernandez v. Catholic Bishop*, 320 F.3d 698 (7th Cir. 2003).

B. Religious Organizations Have the Right to Take "External" Actions, Subject to the Compelling Interest Test, If a Religiously Burdensome Law Has Secular Exceptions.

Some decisions are crucial to "the faith and mission" of a religious organization or individual but cannot easily be characterized as "internal." This may be the case when religious organizations offer services to the general public, as when Catholic Charities places children for adoption, or a religious college admits students of many faiths and of none. Wherever the line is ultimately drawn between internal and external, decisions on the external side of the line may be protected by the rule in *Employment Division v. Smith*, 494 U.S. 872 (1990).

That rule is more protective than has sometimes been assumed. *Smith* held that the Free Exercise Clause creates no right to exemption from neutral and generally applicable laws, such as the "across-the-board criminal prohibition" at issue in that case. *Id.* at 884. *Smith*'s understanding of "generally applicable law" is indicated by its explanation of *Sherbert v. Verner*, 374 U.S. 398 (1963). *Sherbert* held that a worker who lost her job for refusing to work on her Sabbath was constitutionally entitled to unemployment compensation. The state required her to be available for work or lose eligibility, but that rule contained "at least some" secular exceptions. *Smith*, 494 U.S. at 884. Therefore, the Court said, the Constitution required a religious exception as well. Obviously there cannot be many acceptable reasons for refusing available work and claiming a government check instead, but there were "at least some."

The implication is that even rather narrow secular exceptions make a law less than generally applicable.

The Court subsequently made clear that categorical exceptions are as relevant as individualized exceptions. "[C]ategories of selection are of paramount concern when a law has the incidental effect of burdening religious practice." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 542 (1993); *see id.* at 543-44 (relying on categorical exclusions such as hunting, fishing, extermination, and euthanasia to show that ban on animal sacrifice was not generally applicable). The facts of *Lukumi* were extreme, but the Court was clear that its decision was not limited to such extreme cases. The ordinances in *Lukumi* fell "well below the minimum standard" of general applicability. *Id.* at 543.

Many laws contain exceptions or gaps in coverage. When a law exempts some category of secular conduct, but prohibits religious conduct that causes the same or similar alleged harms, the state "devalues religious reasons for [the regulated conduct] by judging them to be of lesser import than nonreligious reasons." *Id.* at 537-38. Sometimes explicitly, and far more often implicitly, a secular exception without a religious exception indicates a "value judgment" that secular motivations "are important enough to overcome" the government's asserted interest, "but that religious motivations are not." *Fraternal Order of Police v. City of Newark*, 170 F.3d 359, 366 (3d Cir. 1999) (Alito, J.). Not every federal judge has read *Smith* and *Lukumi* as carefully as then-Judge Alito. But his reading is the most faithful to this Court's opinions and to the underlying constitutional provision read in light of those opinions.

Some anti-discrimination laws are neutral and generally applicable under this standard, but others are not. If, for example, an anti-discrimination law exempts very small businesses — at least if that exemption reflects a purpose to respect their privacy or free them from the burden of regulation — then the Constitution requires exemptions for religious conscience, subject to the compelling interest test. In a wide range of cases, religious liberty can be protected under *Smith*.

C. Religious Liberty Is Also Protected by State Constitutions and by State and Federal Statutes.

With respect to federal law, the Religious Freedom Restoration Act (RFRA), 42 U.S.C. §§ 2000bb–2000bb-4, protects against substantial burdens imposed on religious liberty. RFRA was enacted to protect religious freedom legislatively, against the risk that the constitutional rule in *Smith* might be interpreted in the least protective manner.

With respect to state law, additional protection for religious liberty is provided by state constitutions and state RFRAs. Nineteen states have now enacted state RFRAs,[37] and in twelve additional states, courts have held that their state constitutions protect the exercise of religion from neutral and generally applicable laws.[38] That is, Congress and thirty-one states have rejected the unprotective half of the rule in *Smith*.

These state-law protections for religious liberty

---

[37] For citations, see Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. Ill. L. Rev. 839, 845 n.26.

[38] For citations, see *id.* at 844 n.22.

are of course not this Court's responsibility. But if the Court invalidates state bans on same-sex civil marriage, it should clearly indicate that it does not mean to preclude state-law protections for religious liberty in this context. The Court would be protecting same-sex couples from discrimination by states. It would not be directing states to override the free exercise of religion by religious organizations or individual believers.

D. In an Appropriate Future Case, the Court Should Reconsider Free-Exercise Exemptions from Generally Applicable Laws.

Some religious refusals to recognize same-sex marriages may be fundamental exercises of conscience, but may not be fairly viewed as "internal decisions," and may be subject to a law with no exceptions — one that is truly generally applicable. In such a case, the Court should be open to reconsidering the unprotective half of the rule announced in *Smith*.

As Justice Souter once explained, there are many reasons to reconsider *Smith*, beginning with the fact that the rule there announced was neither briefed nor argued. *Lukumi*, 508 U.S. at 571-77 (1993) (Souter, J., concurring in the judgment).

Although twenty-five years have now elapsed, *Smith* cannot be said to have become embedded in the law. *Smith*'s rule about generally applicable laws has been interpreted only in *Lukumi*, which would have come out the same way under any standard. *Smith* was merely a background assumption in *City of Boerne v. Flores*, 521 U.S. 507 (1997), which interpreted a completely different clause of the Constitution.

Smith was not applied in *Locke v. Davey*, 540 U.S. 712 (2004). The ban on theology scholarships in that case was neither neutral nor generally applicable; it was upheld on the ground that the refusal to fund in that case did not impose a cognizable burden on the exercise of religion. *Id.* at 720-21. *Smith* was not applied in *Hosanna-Tabor*, 132 S. Ct. 694, which was decided under the separate doctrine about internal church decisions. Nor was *Smith* applied in *Hobby Lobby*, 134 S. Ct. 2751, or in *Holt v. Hobbs*, 135 S. Ct 853 (2015), or in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006), all of which were decided under federal religious-liberty legislation.

These are all the significant free-exercise decisions since *Smith*; the Court's remaining citations to *Smith* are little more than passing references and occasional cursory resolutions of secondary issues that were left unexplored. It is not too late to have full briefing and argument on the rule in *Smith*.

Heightened scrutiny of laws burdening the free exercise of religion would provide a means of protecting the essential interests of both same-sex couples and religious dissenters. In the example of adoption services, a court might consider whether comparable services are readily available from a secular agency. If so, it might conclude that there is no compelling interest in forcing religious adoption agencies to the hard choice of ceasing their operations or repeatedly violating their religious teachings on the nature of marriage.

Smith appears to mean that if a rule is generally applicable, government can refuse religious exemptions whether or not it has a plausible reason,

or any reason at all. A rule of law that takes account of the weight of the competing constitutional interests would do justice more often than a rule that ignores those interests.

Whether or not *Smith* is reconsidered, there are important tools available to protect religious liberty within *Smith* itself, in the doctrine of *Hosanna-Tabor*, in the federal RFRA, and in state law. The Court should use these federal tools to protect religious liberty with respect to marriage, and it should make clear that state courts and legislatures are free to use state law to the same end.

CONCLUSION

The judgments below should be reversed. And this Court should make clear its commitment to protect the religious liberty of churches, synagogues, other religious organizations, and individual believers who refuse to recognize same-sex civil marriages.

Respectfully submitted,

Douglas Laycock
(Counsel of Record)
Univ. of Virginia Law School
580 Massie Road
Charlottesville, VA 22903
434-243-8546
dlaycock@virginia.edu

Thomas C. Berg
University of St. Thomas
School of Law
MSL 400, 1000 LaSalle Ave.
Minneapolis, MN 55403

651-962-4918
tcberg@stthomas.edu

March 6, 2015

APPENDIX

Identifying the Individual Amici

All amici join this brief in their personal capacity. Their respective institutions take no position on the issues in these cases.

Douglas Laycock is the Robert E. Scott Distinguished Professor of Law at the University of Virginia. Issues of religious liberty have been a central part of his scholarship for nearly forty years. He is co-editor of the leading book on these issues, *Same-Sex Marriage and Religious Liberty* (2008), and he has written extensively about the interaction between religious liberty and disagreements over sexual morality. Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. Ill. L. Rev. 839; Douglas Laycock, *Sex, Atheism, and the Free Exercise of Religion*, 88 U. Det. Mercy L. Rev. 407 (2011).

Thomas C. Berg is the James L. Oberstar Professor of Law and Public Policy at the University of St. Thomas (Minnesota). His scholarship has focused on religious liberty; among other things, he is co-author of a leading casebook, *Religion and the Constitution* (3d ed., Aspen Publishers 2011). He has written several articles discussing issues concerning same-sex marriage and religious liberty. Thomas C. Berg, *Progressive Arguments for Religious Organizational Freedom*, 21 J. Contemp. Legal Issues 279 (2013); Thomas C. Berg, *What Same-Sex-Marriage and Religious-Liberty Claims Have in Common*, 5 Nw. J. L. & Soc. Pol'y 206 (2010).

David Blankenhorn is founder and president of the Institute for American Values, a nonpartisan organization whose mission is to study and

strengthen civil society. He is the author of *Fatherless America* (1995), *The Future of Marriage* (2007), *Thrift: A Cyclopedia* (2008), and *New York's Promise* (2013). He is the co-editor of nine more books, the most recent of which is *American Thrift: A Reader* (2013). A 2007 profile in *USA Today* describes him as making "a career of thinking about big issues" and describes the Institute for American Values as "a catalyst for analysis and debate among those with differing views." A 2012 profile in the *Deseret News* says: "A soft-hearted liberal raised in Mississippi and educated at Harvard, he started his career as a civil rights organizer and has since carved out a unique career cutting across ideological lines. He is one of America's most important liberal thinkers concerned about family issues."

Marie A. Failinger is Professor of Law at Hamline University School of Law. She was the editor of the *Journal of Law and Religion* for twenty-five years, and teaches and lectures on theology and law. Among her publications are Marie A. Failinger, Elizabeth R. Schiltz and Susan J. Stabile, *Feminism, Law and Religion* (2013); a forthcoming co-edited treatise on Lutheran theology and secular law; and scholarly articles on law and religion and on same-sex marriage. She serves on the governing or advisory boards of Church Innovations, the Council on Religion and Law, the Journal of Lutheran Ethics, Karamah, and the Council on American Islamic Relations — Minnesota.

Edward McGlynn Gaffney is professor of law at Valparaiso University, where he teaches a course on Comparative Constitutional Law (UK-US) and seminars on Religious Freedom and American

Constitutional History. He is the co-author with Judge John T. Noonan, Jr., of *Religious Freedom: History, Cases and Other Materials on the Interaction of Religion and Government* (3rd ed. 2011). A founding member of the peer-reviewed *Journal of Law and Religion*, he served on its editorial board for more than twenty-five years. From the beginning of the movement to recognize same-sex marriage to this case, he has supported a harmonious approach both to marriage equality and to the rights of religious communities and believers to the free exercise of religion.